

**Testimony Before the Senate Indian Affairs Committee Regarding the Indian Gaming
Regulatory Act
Presented by Frank Chaves, Chairman
New Mexico Indian Gaming Association
July 9, 2003**

Introduction and Summary

Chairman Campbell, honorable members of the Committee with special acknowledgement to our own Senator Pete Domenici, thank you for the opportunity to testify before you today regarding the Indian Gaming Regulatory Act (IGRA) with a focus on the process by which states and Indian tribes negotiate agreements on revenue sharing and the use of gaming revenue by tribal governments. The topic of negotiation of revenue sharing agreements is timely for certain tribal governments in New Mexico as we are likely to have further discussions with the State concerning the compacts negotiated in 2001 in the near future. In addition, we have two tribal governments engaged in litigation over 1997 Compact revenue sharing terms.

In New Mexico there are 22 tribal governments. Tribal communities in New Mexico remain a stronghold of traditional and cultural systems and beliefs. There are 19 Pueblo governments, the Jicarilla and Mescalero Apache Nations and the Navajo Nation. Thirteen of these tribal governments operate Class III Indian gaming, 2 under the 1997 Compacts and 11 under the 2001 Compacts.

Compact negotiations for Class III Indian gaming in New Mexico have a complicated and divisive past. In 1988 and 1989 the state did not respond to our request for compact negotiations. From 1990 to 1994 negotiations failed to produce a compact. The 1995 compacts negotiated and approved in accordance with the IGRA were defeated in the courts first by the New Mexico Supreme Court and then by the Federal Courts. The 1997 compacts approved under the “no action” provisions of the IGRA were not negotiated but legislated by the New Mexico Legislature; the compacts remain subjects of litigation for two tribal governments and the state. Finally, the 2001 compacts evolved out of litigation initiated by the state to enforce revenue sharing payments; a fact that is acknowledged in the compact “Purpose and Objectives” Section H., “To settle and resolve certain disputes that have arisen between the Tribes and the State under the provisions of the Predecessor Agreements.” Although they evolved out of litigation, they were the first compacts negotiated under the state’s Compact Negotiation Act of 1999 and were government-to-government negotiations. This complex history and controversy over compact negotiations and revenue sharing are in part related to IGRA’s failure to secure a level bargaining position for tribes with states as contemplated by Congress. As a result, we are thrown into the state’s political systems in the negotiation process.

In our testimony we hope to impress upon the Committee that in large part the IGRA and Indian gaming in New Mexico is working to provide a better quality of life for many Indian

communities. Indian gaming is also making significant contributions to the larger New Mexico economy in the form of jobs, commerce and additional tax revenue. We are doing this without falling victim to the ills and accusations sensationalized in recent Time Magazine articles on Indian gaming.

We have made significant progress in economic development and tribal state relations, but there is much to be done. We have a new administration in New Mexico that has manifested a policy willingness to work with tribal governments on a government-to-government basis. I hope we can benefit from this in securing our economic development foundation, which in my opinion is currently a soft foundation based on gaming compact term limits and the potential for state policy changes that could challenge tribal tax and other revenue streams.

Compact Negotiations and Revenue Sharing

It is unlikely that anyone will ever be able to explain all the complexities and the incredible history of Indian gaming and compact negotiations in New Mexico. Since 1985 I have had the honor of working with many strong traditional tribal leaders, tribal councils, attorneys and consultants. I still cannot imagine the difficulty they have in taking all these complex issues and history and thoroughly relating them to a decision on a current gaming issue. But, just as Congress and state legislatures must keep abreast of issues so too must tribal leaders. I have included as an attachment to this written testimony, a memo written by a tribal attorney to a Pueblo Governor in just such an attempt to keep abreast of compact and revenue sharing issues in New Mexico. The memo is extensive but does not begin to exhaust all of the history or complex political, legal and policy questions tribal leaders had to face from 1995 to 2001. I hope it gives the Committee a better understanding of the perseverance of New Mexico tribal leaders and what they continue to encounter in trying to secure their people's economic future.

Our experience in revenue sharing began in 1995 with the first compacts approved by the Department of Interior. The revenue sharing rate approximated the state's gross receipts rate at the time and was inclusive of a local government share that would go to local non-tribal units of government of the tribe's choosing. In the latter stages of completing the negotiations of the compacts slot machines at racetracks were put on the table and market exclusivity for tribes began to erode. Then New Mexico Governor Johnson wanted to provide a limited number of slot machines at horse racetracks because the pari-mutuel horse racing industry was dying and needed an injection of revenue to survive. This appeared reasonable to tribal leaders at the time since horse racing was associated with New Mexico agriculture and support industries. Tribes and the State agreed that revenue sharing would be reduced or eliminated if the limited slot machines at the racetracks were to increase. In addition, the

compacts had in essence an automatic renewal provision giving them a near ideal structure for using gaming revenue for long term financing. Little was anticipated of the ability and the push in latter years by the racing industry to increase slot machine activities and compete with tribal government gaming operations and little was anticipated of the compromise of benefits found in the 1995 compacts.

The 1995 compacts were immediately challenged in the state courts and ultimately were defeated in the federal courts. The lawsuits and political activity that took place between 1995 and 1997 made Indian gaming in New Mexico the single most reported issue of that time. Indian gaming was gaining overwhelming support from the public but not from the legislature.

In the 1997 compacts, the revenue sharing provisions were negotiated among legislators in a sort of bidding war and feeding frenzy among special interests with no place at the table for tribal leaders to negotiate on their people's behalf. It was only working through friendly and sympathetic legislators that the revenue sharing demands did not end up higher than the 16% of net win that the legislature eventually chose. While revenue sharing demands increased, gone were the market exclusivity provisions and gone was the potential to obtain long term financing for basic infrastructure and economic diversification. In addition the regulatory payments to the state, which had absolutely no relation to the state's cost of regulation, amounted to millions of dollars in added payment. Included in the compact was an arbitration provision that, to date has been ineffective in resolving revenue sharing issues. Tribal leaders and those representing tribal interests could only watch in anger and frustration as this process continued with no viable judicial or administrative forums available. The anger and frustration of this process was shared by many non-Indian employees, vendors, and many others who were opposed to the continuing assault on Indian rights and the economic discrimination that was taking place right before their very eyes.

After the 1997 compacts were approved under the no-action provisions of the IGRA, tribes continued their attempts to regain reasonable compact terms by requesting negotiations. In addition, efforts to use the arbitration provisions in the 1997 compacts to address the 16% revenue sharing provision have to date been fruitless and furthered suspicion that the state's judicial forums were not exactly blind or unbiased. In 1999 the state did pass a law that was to become a means by which tribal leaders could negotiate with the state on a government-to-government basis. The Compact Negotiation Act of 1999 established a process and defined the authorities by which the state would address requests by tribes for negotiations of compacts. While it does not guarantee a successful negotiation it goes a long way in helping the tribal leaders understand just who the "state" is in negotiating a compact as required under the IGRA.

When properly carried out, the Compact Negotiation Act of 1999 should produce a compact negotiated in a bi-lateral good faith environment. Under the Act, either the state or a tribe may initiate negotiations by providing notice. The Governor of the state can appoint a negotiator and the legislature must establish a joint committee on compacts. Negotiations are conducted with the Governor or the Governor's representative and taken to the joint committee on compacts for review and recommendations. The committee gives its recommendations to the full legislature and by joint resolution the full legislature may accept the proposed compact. There is a provision in the Act that permits the Governor of the State to accept a compact or amendment to a compact from a tribe if the compact or amendment is the same as a compact or amendment that has been approved under the Compact Negotiation Act. What the 1999 Act did not do however was eliminate the involvement of special interests' influence which remains an unofficial part of the negotiation process.

Unfortunately the negotiations under the Act did not bear fruit in 2000. As all of the attempts to negotiate were unsuccessful, and as the administrative and judicial forums simply became unavailable, the tribes decided that the only way to get the state to address the revenue sharing issue was to stop making revenue sharing payments. The Mescalero Apache Nation never made any payments under the 1997 compact and as frustrations mounted some Pueblos also decided to stop making payments. Finally in 2000 after negotiations failed under the Compact Negotiation Act, the remaining tribes that had been making payments stopped doing so. Shortly thereafter the Attorney General filed a lawsuit on June 13, 2000.

Pojoaque Pueblo and the Mescalero Apache Nation remain litigants in the still unresolved suit over the 1997 compacts. Mescalero's response to the lawsuit was to ask the Court to force the arbitration proceeding but the Court has yet to respond and the arbitration provision of the 1997 compact remains untested as a means to resolve revenue sharing questions. The lawsuit posed significant risk for both the state and tribes. These risks were a factor in helping to move both the state and eleven tribes toward a successful negotiation in 2001.

The 2001 compacts were negotiated under the provisions of the Compact Negotiations Act. Under these compacts the tribes enjoy the unrestricted right to engage in all forms of Class III gaming and substantial market exclusivity. For this substantial market exclusivity, the tribes pay the state 8% of their net win on slot machines. If a tribe has a smaller casino generating less than \$12 million in net win annually, they pay 3% of their net win under \$4 million. Under state statute limited operations of slot machines at horse racetracks and veteran/fraternal organizations is permitted, but these entities are not permitted to offer table games. The compacts terminate midnight, June 30, 2015.

The state required affirmative federal approval of the 2001 compacts to ensure it would receive its future revenue sharing payments. First, the lawsuit filed by the state for payment of revenue sharing had to be settled and certified by the Attorney General. The certification requirement had to be met before the Governor of the State could send the compacts to the Secretary of Interior for the federal review process. Both of these requirements were met.

In the recent 2003 State legislative session, non-tribal gaming interests at horse racetracks proposed state legislation to increase their market share through expanded hours of operations. This legislation did not pass in 2003 because tribes again entered the political arena to defend their limited market exclusivity. With the support of the Governor and other state legislative leaders this effort was turned back in favor of continuing to work together to improve Tribal - State relations under the compact. Continued assaults on our market exclusivity and other factors will likely lead to negotiations to amend the 2001 compacts.

There has been much controversy over the issue of revenue sharing. Questions and controversy still remain, yet it appears that revenue sharing is becoming a necessary ingredient in securing gaming compacts. And while the controversies remain, it is better to have controversy than poverty and neglect.

Indian Gaming is Working in New Mexico

While the political and legal history of Indian gaming in New Mexico is remarkable in itself so too is the history of job creation, commerce and a better quality of life for many Indian communities. Historically New Mexico has performed poorly in many areas of economic development and educational attainment. According to the US Census 2000, New Mexico ranked 43rd in the nation average teacher salary, 3rd in the nation in violent crimes per 100,000 population, 47th in the nation in per capita personal income, and 4th in the nation in unemployment. The Native American population in New Mexico as a group is poorer, less educated and more affected by many of the social ills that result from poverty.

In recent years tribal governments engaged in gaming have begun to move from the picturesque poverty so often seen in the cultural tourism promotions of the past toward prosperity and greater contributions to the state's economy. The level of success does vary from tribe to tribe as would be expected in different market areas, but progress large and small has made for a better quality of life. This progress is found in economic development and community development.

Our gaming operations are economic engines providing jobs to many New Mexicans, Indian and non-Indian alike. In Indian communities where populations are relatively large and unemployment is high, gaming operations have provided jobs close to home permitting many to enter the job market for the first time and provide basic necessities of life for their families. In Indian communities with smaller populations, a larger percentage of employees are drawn from surrounding communities, both Indian and non-Indian. In a representative year, tribal gaming enterprises paid out an estimated \$91.7 million in direct gaming employment wages and about \$16.7 million in added employee benefits. In this largely service industry wages are supplemented by tips that further increase job earnings. Indian gaming has provided approximately 6,000 direct gaming jobs. If this number is combined with the approximately 6,000 additional jobs in other tribal enterprises and tribal governments, tribal governments provide over 12,000 jobs. This makes tribal governments with gaming operations the third largest employer in the state behind Kirtland Air Force Base and the University of New Mexico.

We have not estimated the economic spin-off effect in additional jobs and commerce created by our direct employment, but the contribution is significant. The gaming operations create additional commerce through the purchasing of goods, services and sponsorship of events in surrounding communities. In a representative year, more than \$120 million was spent on the purchase of goods and services.

Gaming revenues that flow to the tribal governments are used, as intended by Congress, for governmental purposes. Gaming revenues help tribal governments function. Funds are used for educational programs and scholarships, public safety, water and waste water management, the preservation and protection of land, environmental programs, health and health education, housing repair and development, care for the elderly, tribal court systems, programs for drug and alcohol abuse, culture and language preservation programs and capital improvement programs that are just beginning to address long neglected infrastructure needs. I have noted below just a few examples of the use of gaming revenue by tribal governments in New Mexico.

At Tesuque Pueblo, the Bureau of Indian Affairs is responsible for a day school that teaches the elementary age students of that Pueblo. But the school, an aging adobe structure that is more than a century old, is in danger of falling apart, and only through continual maintenance provided by the Pueblo and the poorly funded BIA education department has the school stayed open. The BIA has a multi-billion dollar backlog on school repair and construction, and the Pueblo, tired of trying to wade through the bureaucratic backlog, decided to spend its own revenue on building a school that should have been provided by the Federal government. Tesuque Pueblo also used gaming dollars to restore much of the historic and living central plaza area homes.

At Isleta Pueblo, where health problems have troubled the community for decades, the Tribal Council created a wellness center and a recreation center to teach healthy lifestyles and a state of the art health center to treat many problems of its people. Isleta health and recreation centers offer the hope that the children of Isleta learn healthy lifestyles and life choices early in life, and give seniors options for a healthier, active lifestyle well into their older years. This recreation center includes a full Olympic size swimming pool, which is used not only by those on the Pueblo but by neighbors in the surrounding area.

At Sandia Pueblo, my Pueblo, we have also built a health center and a wellness center, but we are especially proud of our education program. Any family at Sandia Pueblo can send their children to any school, and the Tribe pays for the cost of that education. This includes pre-school through college. All that is required is that the students finish their schooling. We have used gaming revenue to establish education, health and housing trust funds for the long term; we also built a state-of-the-art wastewater treatment plant for our master planned development area and our residents. Just recently the Tribal Council approved the purchase of a computer for each household on the reservation for educational and communication enhancement.

At Acoma Pueblo, the Tribe has used its revenue to expand its economic base in the tourism industry. The Pueblo replaced the museum and cultural center, built a hotel and first class travel center, and purchased culturally sensitive land. Acoma is the largest employer in Cibola County, which is among the poorest counties in the state.

At Laguna Pueblo, gaming revenues have been reinvested into a major expansion of the Pueblo's economic base, including two travel centers, a resort development project, and the revival of Laguna Industries. Laguna anticipates adding 1,000 jobs this by this fall. In addition, the Pueblo has spent funds on housing development sorely needed by its members.

At Santa Clara Pueblo, the Tribe has reinvested revenue from its small casino operation into a championship golf course that just opened this spring, and in land acquisition in an effort to regain areas of the Pueblo that have been lost over the years.

The Pueblo of San Juan has reinvested their gaming revenue into tourism, an expansion of their economic base, and much needed housing for their tribal members.

San Felipe Pueblo has also invested their revenues in housing for Tribal members, and an

education program for their young. They have expanded their economic base through the creation of a travel center and a car racetrack that draws fans from across the Southwest.

Santa Ana Pueblo has reinvested their gaming revenues into a major expansion of the tourism industry. The pueblo has created a world-class resort and golf center, and has spent millions of dollars on the environmental restoration of the bosque on their land. They have also reinvested their revenues by producing housing for their tribal members.

The Jicarilla Apache tribe has spent gaming revenues on the renewal of their tourism industry. Their focus is on tourists who want to enjoy the beauty of their remote reservation. They offer guest lodges, and hunting and fishing opportunities.

At the Mescalero Apache Tribe, gaming revenues have been used for tourism/hospitality expansion, housing, a school, a dialysis center, senior assisted living home, and reinvestment into the Tribe's industrial base. Mescalero's tourism/hospitality expansion will add to its extensive workforce and make them the largest employer in Lincoln County.

Pojoaque Pueblo has used its gaming revenues to start a museum, develop housing, build a wellness center, and expand their economic base.

At Taos Pueblo, the casino operation has provided revenue for the Tribe to protect its sacred Blue Lake. To stop encroachment or development of the area, the Tribe has purchased land surrounding their sacred area as a buffer zone. This goes directly toward retaining, and maintaining the history, culture, and traditions of this Tribe as they move forward into this century.

In preparation for economic development and economic diversification; tribes have invested in new construction. From 1999 to 2001 we have estimated an investment in new construction of \$350 million dollars in gaming and hospitality related development. I am pleased that many of the Pueblos and Tribes in New Mexico are beginning to prosper through tribal government gaming enterprises and are diversifying their economies. New Mexico's Tribes are on the verge of creating a world-class hospitality and entertainment industry complete with high-class resorts, casinos, golf courses, fine dining and some the best entertainment acts in the country.

I am proud that much progress has been made. This progress has been made without falling victim to the ills and sensationalized accusations of the recent Time Magazine articles. The Pueblos and Tribes of New Mexico are among the most traditional communities in Indian country. We were never

displaced from our land, and we have retained our culture, our languages, and our traditions. But we never could get a foothold into the economic world until Indian gaming. Our tribal leaders had to fight to get what we have, and we have continued to maintain our traditions and our culture even as we move forward economically. But this came about because of wise and careful decisions made by each of the tribal governments. Our governments have not issued per capita checks to members dividing up the proceeds from gaming, and to my knowledge there is no movement in that direction. We have chosen instead to use the gaming revenues to create programs that work for our people, and to continue to diversify our economies into other areas. There are no management companies taking huge cuts of the profits in New Mexico, and there are no lurking controversies over casino profits. Indian gaming is working in New Mexico, and this has created benefits for our Tribes and our people that could not have been imagined before.

These efforts have not gone unnoticed by the new administration in New Mexico or the private sector. We are forming new public and private partnerships to expand New Mexico's tourism industry. The state's Tourism Department is actively promoting Indian casinos and the world-class entertainment being offered. We have formed partnerships with old adversaries as they see the benefits of cooperation to expand the hospitality markets for New Mexico.

Yes, much progress has been made, but much must still be done to secure the economic future for tribes in New Mexico. A few years of success will not make up for the decades of neglect and not all tribes in New Mexico choose gaming or see gaming as a feasible undertaking for their circumstances. To secure our economic future tribal governments must find reliable sources of income upon which they may rely to finance development and operate tribal government over the long term.

In closing I want to thank the Committee for the time you have given to hear our compact and revenue sharing negotiations story and to hear how we use gaming revenue in New Mexico.